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In the

UNITED STATES SUPREME COURT

October Term, 1940.

No. 935

FIRST NATIONAL BANK OF TEMPLE, *Petitioner*,

vs.

CONTINENTAL CASUALTY COMPANY, *Respondent*.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Respondent regrets that it cannot concede the correctness of Petitioner's statement of the case, either in gross or in detail.

Respondent questions the correctness of the assumption on Page 4 of Petitioner's brief, implied in the use of the words "their abstractions", in that it finds no evidence in the record of "abstractions", and finds no evidence that the original losses were occasioned by any act of the three employees mentioned.

The Respondent particularly says that there is not only no evidence of the abstraction of eight of the ten items of "money or securities" described in Petitioner's pleadings, but no evidence of even the loss of such "money or securities", occasioned by acts of such employees or others.

Further, the respondent cannot admit the correctness or fairness of the statement on Page 5 that: "All three of the employees admitted the dishonest taking of Petitioner's money after it opened for business and while the bond was in force, and detailed manner of abstraction." The Respondent therefore submits the following statement as correctly reflecting the record:

A. Lastovica, a sick man (R. 395), under pressure, signed a confession (R. 395), but coincident with the signing thereof demanded an opportunity to detail his shortages (R. 166), and upon the following morning did so to the Board of Directors (R. 167), explaining the origin of such shortages in a manner consistent with entire honesty of purpose (R. 178), to which detailed explanation, with one oversight corrected, he testified on the stand in the criminal case (R. 373), denying any embezzlement (R. 395), and supporting his explanation and testimony with irrefragable evidence, being the actual checks mysteriously lost (R. 382), and as mysteriously found after his discharge (R. 220-251), and other checks cashed by him and returned dishonored over a period of years (R. 383), his own checks for $270.00 (R. 385) carried as cash items

without objection by the bank executives (R. 228,387), supporting his explanation of the remainder with evidence easily verified or disproved (R. 390-4), and never yet disputed, so convincing in its character that even the bank's own witness, an expert auditor, accepted it as true (R. 367).

B. Davis never admitted the taking of any "money or securities" from the bank's assets, but did admit the withholding of credit for deposits for the purpose of concealing or minimizing the existence of the amount of certain checks of the Perkins Meat Company, a customer, being carried as a cash item (R. 225-231).

C. Surghnor never admitted the dishonest taking of Petitioner's money, but did admit the existence of a shortage due to losses suffered by the parent bank, in some undisclosed fashion, and the concealment thereof by him by withholding credits for deposits made in the new bank. (R. 218).

Petitioner's statement, furthermore, is entirely deficient, being in general terms and in failing to disclose the specific losses claimed in plaintiff's pleadings, so that the evidence and the court's charge may be measured by its pertinence thereto. We attempt to here supply the missing matter:

The bond sued upon insured Petitioner against loss of "money or securities" occasioned by any dishonest acts of employees (R. 6). Seven of the losses constituting the great bulk of the losses, are described by the

Petitioner in its pleadings, and as numbered therein, were:

2. Embezzlement on or about April 1, 1935 by J. E. Lastovica of a deposit made by Charles Navratil in the sum of $613.44, (R. 8).

3. Embezzlement on or about April 5, 1935, by J. E. Lastovica of a deposit made by Jerry Motl in the sum of $20.00, (R. 8).

4. Embezzlement on or about March 27, 1935, by H. C. Surghnor and/or Sam Davis of a deposit made by A. E. Warren, tax collector, in the amount of $3,-047.16, (R. 8).

5. Embezzlement on or about March 19, 1935, by H. C. Surghnor and/or Sam Davis of a deposit made by the Southland Cotton Oil Company in the amount of $1,616.18, (R. 9).

6. Embezzlement on or about March 2, 1935, by Surghnor or Davis of a deposit made by Bell Publishing Company in the amount of $1,468.13 (R. 10).

7. Embezzlement on or about April 1, 1935 of a deposit made by Thompson Grocery Company in the amount of $1,122.99, (R. 10).

8. Embezzlement on or about March 29, 1935 by Surghnor or Davis of a deposit made by Bell County in the amount of $6,986.00 (R. 11).

As to No. 2 (Charles Navratil—$613.44), the evidence showed that the money and securities contained

in said deposit consisted of a single draft on a Dallas bank, which went into the bank's assets, properly cleared, and the bank received the benefit thereof. (R. 357).

As to No. 4 (A. E. Warren—$3,047.16), the evidence showed that this deposit was made in a Belton bank and was actually credited to the Petitioner (R. 185) and it therefore received full benefit thereof.

As to the remaining five items, there is not a scintilla of evidence that the bank did not receive into its assets every item contained in such deposits, and there is not a scintilla of evidence that any employee of the bank ever received a dollar thereof, either directly or indirectly.

ARGUMENT

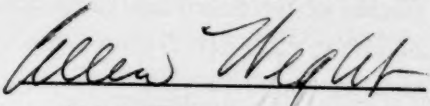
The true situation is disclosed by the findings of the Circuit Court of Appeals, on both appeals.

Nobody knows when the losses occurred. Nobody knows whether they were due to dishonesty, negligence or to bad loans, or the Depression, or the thousand other things that may cause loss to a bank. Nobody knows or ever will know whether, at the moment of the succession of the new bank to the parent bank, the books of either correctly disclosed the cash in their possession, the notes in their note cases, the genuineness or value thereof, or whether such record revealed the full measure of their deposits and other liabilities.

It is apparent, of course, as necessarily found by the Circuit Court of Appeals, on both appeals, that these losses long antedated the items described in Petitioner's pleadings, and that the evidence relied upon as establishing loss, merely established a terminal concealment of loss of unknown character, arising at a time long antecedent thereto. It is equally apparent that there was no loss resulting to the bank from the mere discovery of the loss, and most certainly apparent that the money and securities described in Petitioner's pleadings as embezzled were not in fact embezzled.

This is as apparent to Petitioner's attorney as to anyone else. Otherwise he would not be so anxious to obscure a consideration of his own pleadings and to avoid a discussion thereof. Otherwise he would not have resorted to his so-called expert testimony that a loss is not a loss until it is discovered. Absent such testimony, his case, as made by his pleadings, is wholly without support.

The contention that the admission of such testimony, and the sanctification thereof by the charge of the court, did not prejudice the rights of the defendant, is wholly untenable, and the judgment of the Circuit Court of Appeals reversing the case should therefore be affirmed.



ALLEN WIGHT,
Counsel for Respondent.